

§ 31.3121(v)(2)-2

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section as in effect for all amounts deferred for periods ending after December 31, 1993, any benefit payments attributable to amounts deferred in periods ending after December 31, 1993, will be included in wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section.

Example 6: (i) The facts are the same as in *Example 5*, except that Employer Q chooses (in accordance with paragraph (g)(3) of this section) to adjust its FICA tax determination for all pre-effective-date open periods by treating this section as in effect for all amounts deferred for those periods. In addition, Employer Q chooses (in accordance with paragraph (g)(4)(ii)(E) of this section) to take the amounts deferred for 1994 and 1995 into account by treating these amounts as FICA wages paid and received by Employee E on January 15, 2000.

(ii) In accordance with the nonduplication rule of paragraph (a)(2)(iii) of this section, because all amounts deferred for Employee E under the plan were taken into account (or treated as taken into account), any benefit payments made to Employee E under the plan will not be included as FICA wages when actually or constructively paid.

Example 7: (i) The facts are the same as in *Example 5*, except that Employer Q does not withhold and deposit the FICA tax due on benefits actually or constructively paid before January 1, 2000.

(ii) Because Employer Q did not withhold and deposit the FICA tax due on benefits actually or constructively paid before January 1, 2000, Employer Q did not determine FICA tax liability and satisfy FICA tax withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2). Thus, the transition rules provided in paragraphs (g)(3) and (4) of this section do not apply. As a result, any amount that would have been required to have been taken into account under this section before 1994 is not treated as if it had been so taken into account under paragraph (g)(4)(ii)(D) of this section, and benefit payments attributable to amounts deferred before January 1, 2000, are treated as FICA wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section.

Example 8: (i) In 1993, Employer R establishes a nonqualified deferred compensation plan for Employee F under which Employee F will have a fully vested right to receive a lump sum payment in 2000 equal to 50 percent of Employee F's highest rate of salary. On December 31, 1993, Employee F's highest salary is \$1 million. In accordance with a reasonable, good faith interpretation of section 3121(v)(2), Employer R determines that, for 1993, there is an amount deferred that must be taken into account as wages for FICA tax purposes. Based on Employer R's

estimate that Employee F's highest salary will be \$3 million in 2000, Employer R determines that the amount deferred is equal to the present value in 1993 of \$1.5 million payable in 2000. However, because Employee F has other wages in 1993 that exceed the applicable OASDI and HI wage bases for that year, no additional FICA tax is paid as a result of that amount deferred being taken into account for 1993. In addition, Employer R takes no amounts into account under the plan after 1993 for Employee F. Under paragraphs (e)(1) and (4)(ii)(D)(2) of this section, the largest amount that could have been taken into account in 1993 is the present value of a lump sum payment of \$500,000, payable in 2000, because that is the maximum amount to which Employee F has a legally binding right as of December 31, 1993. Employee F's highest salary is, in fact, \$3 million in 2000 and Employee F receives \$1.5 million under the plan on December 31, 2000.

(ii) In accordance with paragraphs (g)(1) and (4)(iii)(A) of this section, the determination of the amount deferred under the plan for any period beginning on or after January 1, 2000, and the time when that amount deferred is required to be taken into account must be determined in accordance with this section. In addition, these determinations must be made without regard to any amount deferred that was taken into account for any period ending before January 1, 2000, that could not be taken into account before January 1, 2000, if paragraphs (a) through (f) of this section had been in effect. Because no FICA tax was actually paid on that \$1 million in 1993, no overpayment of tax was caused by the overinclusion of wages in 1993 and, thus, Employer R is not entitled to a refund or credit (even assuming that the period of limitations has been kept open for periods in 1993). In addition, because the difference between the present value of the \$1.5 million payment and the present value of a \$500,000 payment was not taken into account for periods beginning on or after January 1, 1994, \$1 million must be included in FICA wages under the general timing rule when paid.

[64 FR 4547, Jan. 29, 1999; 64 FR 15687, Apr. 1, 1999]

§ 31.3121(v)(2)-2 Effective dates and transition rules.

(a) *General statutory effective date.* Except as otherwise provided in paragraphs (b) through (e) of this section, section 3121(v)(2) and the amendments made to section 3121(a)(2), (a)(3), and (a)(13) by the Social Security Amendments of 1983 (Pub. L. 98-21, 97 Stat. 65), as amended by section 2662(f)(2) of the Deficit Reduction Act of 1984 (Pub. L. 98-369, 98 Stat. 494), apply to

amounts deferred and benefits paid after December 31, 1983.

(b) *Definitions.* For purposes of § 31.3121(v)(2)-1 and this section, the following definitions apply:

(1) *FICA.* *FICA* means the Federal Insurance Contributions Act (26 U.S.C. 3101 *et seq.*).

(2) *457(a) plan.* A *457(a) plan* means an eligible deferred compensation plan of a State or local government or of a tax-exempt organization to which section 457(a) applies.

(3) *Gap agreement.* *Gap agreement* means an agreement adopted after March 24, 1983, and on or before December 31, 1983, between an individual and a nonqualified deferred compensation plan within the meaning of § 31.3121(v)(2)-1(b). Such an agreement does not fail to be a gap agreement merely because the terms of the plan are changed after December 31, 1983.

(4) *Individual party to a gap agreement.* *Individual party to a gap agreement* means an individual who was eligible to participate in a gap agreement on December 31, 1983, under the terms of the agreement on that date. An individual will be treated as an individual party to a gap agreement even if the individual has not accrued any benefits under the plan by December 31, 1983, and regardless of whether the individual has taken any specific action to become a party to the agreement. However, an individual who becomes eligible to participate in a gap agreement after December 31, 1983, is not an individual party to a gap agreement.

(5) *Individual party to a March 24, 1983 agreement.* *Individual party to a March 24, 1983 agreement* means an individual who was eligible to participate in a March 24, 1983 agreement under the terms of the agreement on March 24, 1983. An individual will be treated as an individual party to a March 24, 1983 agreement even if the individual has not accrued any benefits under the plan by March 24, 1983, and regardless of whether the individual has taken any specific action to become a party to the agreement. However, an individual who becomes eligible to participate in a March 24, 1983 agreement after March 24, 1983, is not an individual party to a March 24, 1983 agreement.

(6) *March 24, 1983 agreement.* *March 24, 1983 agreement* means an agreement in existence on March 24, 1983, between an individual and a nonqualified deferred compensation plan within the meaning of § 31.3121(v)(2)-1(b). Such an agreement does not fail to be a March 24, 1983 agreement merely because the terms of the plan are changed after March 24, 1983. In addition, for purposes of this paragraph (b)(6) only, any plan (or agreement) that provides for payments that qualify for one of the retirement payment exclusions is treated as a nonqualified deferred compensation plan. For example, § 31.3121(v)(2)-1(b)(4)(v) provides that certain benefits established in connection with impending termination do not result from the deferral of compensation and thus are not considered deferred under a nonqualified deferred compensation plan. However, a plan that provides such benefits and that was in existence on March 24, 1983, is treated as a nonqualified deferred compensation plan for purposes of this paragraph (b) to the extent it provides benefits that would have satisfied one of the retirement payment exclusions.

(7) *Retirement payment exclusions.* *Retirement payment exclusions* are the exclusions from wages (for FICA tax purposes) for retirement payments under section 3121(a)(2)(A), (a)(3), and (a)(13)(A)(iii), as in effect on April 19, 1983 (the day before enactment of the Social Security Amendments of 1983).

(8) *Transition benefits.* *Transition benefits* are payments made after December 31, 1983, attributable to services rendered before January 1, 1984. For this purpose, transition benefits are determined without regard to any changes made in the terms of the plan after March 24, 1983, in the case of a March 24, 1983 agreement or after December 31, 1983, in the case of a gap agreement.

(c) *Transition rules*—(1) *In general.* Except as provided in paragraph (c)(2) or (3) of this section, the general statutory effective date described in paragraph (a) of this section applies to benefit payments after December 31, 1983. Thus, except as provided in paragraph (c)(2) or (3) of this section, section 3121(v)(2) applies, and the retirement payment exclusions do not apply, to benefit payments made after December

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31, 1983, even if the benefit payments are made under a March 24, 1983 agreement or a gap agreement.

(2) *Transition benefits under a March 24, 1983 agreement.* With respect to an individual party to a March 24, 1983 agreement, transition benefits paid under that March 24, 1983 agreement (except for those paid under a 457(a) plan) are not subject to the special timing rule of section 3121(v)(2) and are subject to section 3121(a) as in effect on April 19, 1983. Thus, transition benefits under a March 24, 1983 agreement (except for those under a 457(a) plan) to an individual party to a March 24, 1983 agreement are excluded from wages (for FICA tax purposes) only if they qualify for any of the retirement payment exclusions (or any other exclusion provided under section 3121(a) as in effect on April 19, 1983).

(3) *Transition benefits under a gap agreement.* With respect to an individual party to a gap agreement, the payor of transition benefits under the gap agreement must choose to either—

(i) Take the transition benefits into account as wages when paid; or

(ii) Take the amount deferred (within the meaning of § 31.3121(v)(2)-1(c)) with respect to the transition benefits into account as wages under section 3121(v)(2) (as if section 3121(v)(2) had applied before its general statutory effective date).

(d) *Determining transition benefit portion.* For purposes of determining the portion of total benefits under a non-qualified deferred compensation plan that represents transition benefits, if, under the terms of the plan, benefit payments are not attributed to specific years of service, the employer may use any reasonable method. For example, if a plan provides that the employee will receive benefits equal to 2 percent of high 3-year average compensation multiplied by years of service, and the employee retires after 25 years of service, 9 of which are before 1984, the employer may determine that 9/25 of the total benefit payments to be received beginning in 2000 are transition benefits attributable to services performed before 1984.

(e) *Order of payment.* If an employer determines, in accordance with paragraph (d) of this section, that a portion

of the total benefits under a non-qualified deferred compensation plan constitutes transition benefits, then, for purposes of determining the portion of each benefit payment that constitutes transition benefits, the employer must treat each benefit payment as consisting of transition benefits in the same proportion as the transition benefits that have not been paid (as of January 1, 2000) bear to total benefits that have not been paid (as of January 1, 2000), unless such allocation is inconsistent with the terms of the plan. However, for a benefit payment made before January 1, 2000, the employer may use any reasonable allocation method to determine the portion of a payment that consists of transition benefits, provided that the allocation method is consistent with the terms of the plan.

[64 FR 4567, Jan. 29, 1999]

§ 31.3123-1 Deductions by an employer from remuneration of an employee.

Any amount deducted by an employer from the remuneration of an employee is considered to be part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress or the law of any State requires or permits such deductions and the payment of the amount thereof to the United States, a State, or any political subdivision thereof.

Subpart C—Railroad Retirement Tax Act (Chapter 22, Internal Revenue Code of 1954)

TAX ON EMPLOYEES

§ 31.3201-1 Measure of employee tax.

The employee tax is measured by the amount of compensation received for services rendered as an employee. For provisions relating to compensation, see § 31.3231(e)-1. For provisions relating to the circumstances under which certain compensation is to be disregarded for the purpose of determining the employee tax, see paragraphs (b)(1) and (2) of § 31.3231(e)-1.

[T.D. 8582, 59 FR 66189, Dec. 23, 1994]